No. 83-699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN INDUSTRIES, LTD., a Nevada corporation,
SAVAHAI, INC., a Nevada corporation, and
ZACK C. MONROE,

Petitioners,

—vs.—

INTERMODAL CARGO SERVICES, INC., E.D. OSGOOD,
KEN RIDLEY, JOHN MADROSEN, FRED HIGA,
GEORGE CASSELLA and JACK MASLANIAK,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION OF RESPONDENTS

ROGERS, JOSEPH, O'DONNELL
& QUINN
MARTIN QUINN
WILLIAM B. CHAPMAN
BARBARA L. HULBURT
505 Sansome Street
14th Floor
San Francisco, CA 94111
(415) 956-2828

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether an award of attorneys' fees based on petitioners' conduct in this case may be justified under the "bad faith exception" to the so-called "American rule," and/or Section 18 of the Securities Exchange Act of 1934.

2. Whether, under the facts of this case, California's parol evidence rule required the exclusion of evidence showing that respondents were fraudulently induced to enter into certain contracts.

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The Court of Appeals issued its Memorandum Opinion on June 17, 1983. This opinion appears on pages 1-4 of the Appendix to the Petition for Writ of Certiorari already filed in this Court. The district court did not issue an opinion. Its Findings of Fact and Conclusions of Law are also appended to petitioners' papers.

JURISDICTION

Judgment was entered by the Court of Appeals on June 17, 1983, and a petition for rehearing was denied on July 29, 1983. A Petition for Writ of Certiorari was then timely filed in this Court, which has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78r:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(Emphasis added.)

STATEMENT OF THE CASE

A. Procedural Background.

This case was brought in the United States District Court for the Northern District of California pursuant to federal subject matter jurisdiction under 28 U.S.C. §1331 to litigate issues arising under Section 22 of the Securities Act of 1933, 15 U.S.C. §77v, Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, and principles of pendent jurisdiction.

The district court found that petitioners made material untrue statements and failed to state material facts in connection with the purchase by respondents of certain shares of stock. [Findings of Fact and Conclusions of Law ("Findings") 12:17-19]. As a result of this and other findings relating to the conduct of

petitioners, the district court found that petitioners had violated Rule 10b-5, 17 CFR §240.10b-5; Sections 5 and 12 of the Securities Act of 1933, 15 U.S.C. §§77e and 1; Sections 15 and 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§78o and r; and Sections 25401, 25501, 25503, and 25110 of the California Corporations Code. [Findings 14:20-26].

The district court also found that petitioners' fraudulent acts and misrepresentations had induced respondents to enter into one or more agreements, that these agreements were of no effect, and that respondents had been defrauded of the payments made to petitioners under these agreements. [Findings 14:27-15:7]. For these acts, the district court held petitioners liable for $153,000 plus interest and, based on conduct which will be described below, also awarded attorneys' fees to respondents in the amount of $95,749.63.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court in all particulars. With reference to the questions presented here, the Ninth Circuit upheld the district court's finding that the agreements at issue had been fraudulently induced, and that respondents, Intermodal Cargo Services, Inc., E.D. Osgood, Ken Ridley, John Madrosen, Fred Higa, George Cassella and Jack Maslaniak (hereafter referred to individually or collectively as "Osgood"), the defrauded parties, should recover their damages. [Memorandum Opinion, page 2].

The Ninth Circuit also held that the trial court did not err in awarding attorneys' fees based on petitioner's "fraudulent and misleading behavior in his business dealings with the plaintiffs and his evasive conduct at trial." [Memorandum Opinion, page 4].

B. Factual Background.

Petitioners American Industries, Ltd., Savahai, Inc., and Zack C. Monroe (hereafter referred to individually or collectively as "Monroe") owned mines in Arizona and California. Monroe met Osgood through Francesco Circiello, President of International Trade Investments, Inc. (hereafter referred to individually or collectively as "Circiello"), and by a series of misrepresentations induced Osgood to invest in the "production of 1,000 ounces of gold per month" from Monroe's mines. [Findings 3:3-10]. In reliance upon Monroe's representations, Osgood advanced money to Monroe (through Circiello) which was supposed to pay Monroe's expenses in mining and refining the gold. In return, Osgood was to get a substantial share of the profits to be gained from this production of gold. [Findings 6:8-10; 7:20-8:6]. Also in reliance upon the

misrepresentations of Monroe, Osgood purchased 33,000 shares of American Industries stock at about three dollars a share. [Findings 13:14-16].

Monroe's mine produced no gold. [Findings 11:1-5]. The stock purchased by Osgood had no value. [Findings 13:14-16]. Osgood brought the action below to recover its investments in Monroe's fraudulent scheme, and both the trial court and the appellate court allowed that recovery.

Throughout the litigation, Monroe sought to obstruct its progress. His behavior during discovery and at trial was calculated to and did disrupt and delay the proceedings. For one example, Monroe failed at trial to produce the original of a key (and fraudulent) document, which had earlier been identified at a deposition. This, despite Monroe's promise on the stand to produce the document. [Reporter's Transcript ("RT") 179:23-180:19, 61:14-22,

342:17-343:4]. For another example, Monroe feigned memory loss at deposition* and at trial, whenever it served his purposes. [RT 1003:24-1004:3, e.g.].

As a result, the trial judge found Monroe to be evasive and unbelievable, and determined that his testimony "was to be viewed with extreme caution." [Findings 4:19-31]. Monroe was undaunted in his deceptions and remained intransigent throughout the litigation. For such behavior the courts below allowed recovery of Osgood's attorneys fees.

*Monroe also failed without notice to attend his first deposition and interfered frequently in the depositions of others.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Questions Which Warrant Further Review.

Respondents have restated the compound and confusing questions presented by petitioners in an effort to clarify the issues before the Court. No matter how the questions are phrased, however, they do not raise questions of general significance but instead present questions of fact of the sort the Court typically declines to address. As the Court said in United States v. Johnston, 268 U.S. 220, 227, (1925): "We do not grant a certiorari to review evidence and discuss specific facts." That is precisely what petitioners here are asking the Court to do.

A. No Federal Question Is Presented.

Neither of the "questions" presented by petitioners raises a proper federal

question. The first, related to the award of attorneys' fees, amounts to a mere factual challenge of the basis in the record for the finding of bad faith below. The legal basis for the courts' decision, discussed more fully below, is firmly established.

The second "question" petitioners present does not involve a federal issue at all. California law determines the parol evidence issue in question. And, as the Court made plain in Huddleston v. Dwyer, 322 U.S. 232, 237 (1944): "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

B. This Case Turns Entirely On Its Facts.

Petitioners themselves do not challenge the legal basis for the award of

attorneys' fees, because the law is clear. As is stated on page 20 of the Petition, "[t]he United States Supreme Court has long recognized the 'Bad Faith' exception." Where, as here, the only issue raised is as to the factual support in the record for the findings below, the Court has consistently held that it will not grant certiorari:

> [T]his Court ... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). This rule has "particular force" in situations where, as here, the credibility of witnesses based on their demeanor at trial plays a major role in the determinations of the trial court. Berenyi v. District Director, Immigration & Naturalization Service, 385 U.S. 630, 636 (1967).

C. This Case Has No Significance Beyond Its Monetary Impact On The Parties.

This case relates only to the parties involved in this particular controversy, and has no impact on other groups or individuals. There do not exist in this litigation any "'[s]pecial and important reasons' [which] imply a reach to a problem beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955)(cert. dismissed as improvidently granted). This case raises no novel issues of law which must be addressed by the Court because of their potential effect on other litigants.

II. The Award Of Attorneys' Fees Was Proper In This Case.

The Court of Appeals found that Monroe's "fraudulent and misleading behavior in his business dealings with the [respondents] and his evasive conduct at

trial inexorably lead to the conclusion that he acted in bad faith." [Memorandum Opinion, p. 4]. As the Court said in Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978):

> An equity court has the unquestioned power to award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation....

Monroe's evasive and disruptive conduct prior to and during the trial amply support the finding that Monroe acted in bad faith in this case.

A. The Court of Appeals Correctly Interpreted The Court's Recent Decisions.

The seminal current case upholding the non-statutory award of attorneys' fees is Hall v. Cole, 412 U.S. 1 (1973). In Hall, the Court recognized an exception to the so-called "American rule," under which each party is normally held responsible for its own attorneys' fees. That exception allows

the award of attorneys' fees at the discretion of a federal court whenever a finding is made that an unsuccessful party has acted in bad faith.

Here, the Ninth Circuit explicitly relied on Hall, and cited the following passage in support of its decision to affirm the trial court's award of attorneys' fees:

> [I]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted ... 'in bad faith, vexatiously, wantonly, or for oppressive reasons'. [412 U.S. at 5].

[Memorandum Opinion, p. 4].

Both courts below made clear their belief that such an exercise of discretion was warranted by the record in this case, and the Ninth Circuit's opinion specifically states that its support of the award of attorneys' fees was based on the grounds set forth in Hall, and F.D. Rich Co. v. United States, Industrial Lumber Co. Inc.,

417 U.S. 116 (1974). Accord, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Hutto v. Finney, 437 U.S. 678 (1978).

Such an exercise of discretion is well within the powers of the trial court. See, e.g., Bell y. School Board, 321 F.2d 494, 500 (4th Cir. 1963) ("award of counsel fees lies within the sound discretion of the trial court"), Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473, 481 (4th Cir. 1951) (allowance of attorneys fees is matter resting in sound discretion of trial judges), cited with approval in Hall v. Cole, 412 U.S. at 5. As petitioners have put forward no persuasive argument to show that the district court abused its discretion, the award was properly affirmed by the Court of Appeals. See, e.g., Perichak v. Int'l Union of Elec. Radio, 715 F.2d 78 (3d Cir. 1983) (once a finding of

"bad faith" is made, party opposing fees must show decision to award fees exceeded reasonable exercise of discretion), Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975) ("abuse of discretion" is proper standard of review for award of attorneys' fees).

B. The Facts of This Case Justify Attorneys' Fees Under Either 15 U.S.C. §78r or the "Bad Faith Exception."

Although the Court of Appeals based its affirmance of the award of attorneys' fees on petitioners' bad faith, the district court's findings would also support the award on another basis: petitioners' violation of Section 18 of the Securities Exchange Act of 1934, 15 U.S.C. §78r.

Where Section 18 of the 1934 Act is violated, subsection (a) allows the court "in its discretion" to award reasonable attorneys' fees. As with their challenge

to the "bad faith exception," petitioners do not make any argument that Section 18 would not support such an award. Rather, they attempt to bring into question the factual validity of the district court's finding of a violation of Section 18.

It is unnecessary, however, to decide whether petitioners' violation of Section 18, is a separate basis for the award of attorneys' fees in this case, or whether case law has merged such statutory grounds with the "bad faith exception." This is so because the courts below were clearly correct in their application of the "bad faith exception" in this case.

As the cases have repeatedly made clear, attorneys' fees may be awarded in the absence of any express statutory authority whenever "bad faith" is found before or during the litigation. Petitioners have sought to obscure this rule by erroneously or intentionally citing, at

page 28, only the Circuit Court decision in Monk v. Roadway Express, Inc., 599 F.2d 1378 (5th Cir. 1979), aff'd in part and remanded sub nom Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). According to petitioners, the Fifth Circuit reversed an award of attorneys' fees in a case arising under 28 U.S.C. §1927 for lack of statutory authority. But what petitioners failed or omitted to note was that in Roadway Express, Inc. v. Piper, the Court granted a writ of certiorari, affirmed with respect to the lack of statutory grounds, and then went on to point out that federal courts had the inherent power to award attorneys' fees whenever the losing party has acted in bad faith. As the Court in Roadway Express, Inc. v. Piper said:

> The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "'[B]ad faith' may be found, not only in the actions that led to

> the lawsuit, but also in the conduct of the litigation."

457 U.S. at 766. Thus, the Court remanded to allow the district court to make a "specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers." Id. at 767.

C. This Case Raises No Conflict Among the Circuits.

On page 26 of the Petition, petitioners state that, "[i]f the Court of Appeals did not affirm the award of fees on grounds sanctioned by Vaughan v. Atkinson [369 U.S. 527, (1962)] it is either in conflict with the holdings of other Courts of Appeal ... or it attempts to break new ground."

It is clear from the Memorandum Opinion that the Ninth Circuit did rely on grounds sanctioned by Vaughan and other

Supreme Court cases, and that its opinion is in complete harmony with those decisions. In Vaughan, the Court stated that the allowance of counsel fees is "part of the historic equity jurisdiction of the federal courts," and is not limited to express statutory authorization. 369 U.S. at 530. And the reasoning in Vaughan, relating to the discretion of the lower courts, is the same as that later set forth in Hall v. Cole, 412 U.S. 1, upon which the Court of Appeals relied. Thus, no aspect of the decision below "attempts to break new ground."

There is also no substantial conflict among the Circuits with regard to the award of attorneys' fees. Hall and Vaughan have been followed by those courts which have directly addressed the matter. See, e.g., Perichak v. Int'l Union of Elec. Radio, 715 F.2d 78 (3d Cir. 1983)(fees may be awarded in the trial court's discretion "when the

interests of justice so require"); McCandless v. Great Atlantic & Pacific Tea Co., Inc., 697 F.2d 198 (7th Cir. 1983) (followed Hall); Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983)(fees awarded for litigation where action was maintained in bad faith); Cornwall v. Robinson, 654 F.2d 685 (10th Cir. 1981)(fees awarded for bad faith and "vexatiousness"); Lipsig v. National Student Marketing Corp., 663 F.2d 178 (DC Cir. 1980)(fees awarded for dilatory tactics in discovery and at trial).

While not every case has used exactly the same verbal formulation in determining whether or not to award attorneys' fees under the "bad faith exception," there is no conflict in the principle that egregious conduct is proscribed. Within this principle, the determination of whether "bad faith" is present is a factual one and depends on the circumstances of each case.

This is not the kind of "conflict" which warrants review by this court.

D. Petitioners' Contention that the Bad Faith Found Below was Based on the Assertion of a Frivolous Defense is Erroneous.

Petitioners are wrong in their assertion that the Court of Appeals based its affirmance of the trial court's decision on a finding that petitioners put forward their defense without color of right. There is no suggestion of this in the record, which contains instead numerous references to petitioners' bad faith.

And, of course, the assertion of a colorable claim or defense does not negate the possibility of bad faith. As the District of Columbia Circuit Court of Appeals stated:

> [B]ad faith "does not require that the legal and factual bases for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy or mala

> fides, the assertion of a colorable claim will not bar the assessment of attorneys' fees against him."

Lipsig v. National Student Marketing Corp., 663 F.2d 178, 182 (DC Cir. 1980). It was precisely this kind of bad faith which the courts below found here. Whether petitioners' defense was "colorable" is, therefore, irrelevant.

III. The California Parol Evidence Rule Does Not Exclude Evidence of Fraud.

The District Court found that Osgood was fraudulently induced by Monroe to enter into a contract which required it (through Circiello) to advance $100,000 per month, plus a $20,000 good faith deposit, in exchange for a (false) promise by Monroe to produce 1,000 ounces of gold per month. [Findings 3:3-10.] The parol evidence rule does not apply to this situation.

The California Parol Evidence Rule has been codified in Code of Civil Procedure

Section 1856. Subsections (f) and (g) of Section 1856 state as follows:

> (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.
>
> (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

Petitioners cite no cases calling into question the validity of this language, because there are none. Where, as here, the evidence sought to be introduced is evidence dealing with the validity or fraudulent inducement of an agreement, it will be admitted. Here, Osgood's evidence showed that Monroe knowingly made fraudulent misrepresentations about his "gold-rich" ore, about certain gold assays, and about the actual production of the mine

just prior to the agreements. The Osgood-Monroe agreements were made on the basis of these misrepresentations. This was evidence of "a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof." Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 274 (1949). Such misrepresentations, said the trial court, constituted fraud. Petitioners' reliance on the parol evidence rule is misplaced: the courts below correctly applied California law to the facts before them.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit should be denied.

Dated: December 29, 1983

MARTIN QUINN
WILLIAM B. CHAPMAN
BARBARA L. HULBURT
ROGERS, JOSEPH, O'DONNELL
& QUINN

Attorneys for Respondents

CERTIFICATE OF SERVICE

State of California)
) ss
County of San Francisco)

I hereby certify that on this 4th day of January, 1984, three copies of the Opposition of Respondents were mailed, postage prepaid, to Lawrence A. Merryman, 300 So. 4th Street, #1503, Las Vegas, Nevada 89101, Counsel for the petitioners. I further certify that all parties required to be served have been served.

Executed on January 4th, 1984 at San Francisco, California.

Martin Quinn
Rogers, Joseph, O'Donnell
& Quinn
505 Sansome Street, 14th Fl.
San Francisco, CA 94111
(415) 956 2828

Attorneys for Respondents